

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

C.W.P. No. 6540 of 2007
DATE OF DECISION: 20.7.2007

M/s Escotel Mobile Communication Ltd.

...Petitioner

Versus

State of Haryana and another

...Respondents

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR

HON'BLE MR. JUSTICE AJAY KUMAR MITTAL

Present: Mr. Avneesh Jhingan, Advocate,
for the petitioner.

Ms. Ritu Bahri, DAG, Haryana,
for the respondents.

M.M. KUMAR, J.

The right to payment of interest on refund has once again been raised in this petition filed by M/s Escotel Mobile Communication Ltd. (for brevity, 'the assessee petitioner') by invoking the writ jurisdiction of this Court under Article 226 of the Constitution. It has been prayed that direction be issued to the respondent State to refund Rs. 95,66,924/- plus interest (46,58,324 + 49,08,600 plus interest) for the assessment years 2000-01 and 2001-02.

The assessee petitioner was a registered dealer under the Haryana General Sales Tax Act, 1973 (for brevity, 'the Act') as well as the Central Sales Tax Act, 1956 (for brevity, 'the 1956 Act'). Subsequently, it has been registered, after the repeal of the Act, under the Haryana Value Added Tax Act, 2003 (for brevity, 'the VAT Act'). The assessee petitioner is engaged in the business of mobile telecommunication and is a Limited Company. It is carrying on its business at Anand Banquet Hall, Delhi Road, Sonapat. The assessee petitioner filed statutory returns for the assessment years 2000-01 and 2001-02. The assessment was finalized by the Assessing Authority, Sonapat, vide orders dated 30.1.2003 and 26.2.2003 respectively. The element of 'Activation Charges' was included in the turnover by the assessing authority, which levied tax and interest creating additional demands of Rs. 46,48,324/- and Rs. 49,29,593/- in respect of both the assessment years under the Act. Aggrieved by those assessment orders, the assessee petitioner filed two appeals, which were dismissed by the Joint Excise and Taxation Commissioner (Appeals) Rohtak, vide order dated 30.4.2004. On further appeal to the Haryana Tax Tribunal (for brevity, 'the Tribunal'), the orders of assessment were set aside, vide order dated 25.4.2006 (P-1). The Tribunal followed the judgment of Hon'ble the Supreme Court in the case of **Bharat Sanchar Nigam Limited v. Union of India**, (2006) 3 SCC 1, and held that the value of SIM Card Activation Charges could not be included in turnover. The view of the Tribunal is discernible from the penultimate para of its order, which read as under:-

“ Activation charges is a service provided by the service providers to the users of handsets. Service of activation of the SIM Card is only service and is not includible in the value of SIM Card. In view of what the Hon’ble Supreme Court has decided in Writ Petition (Civil) 183 of 2003 (Bharat Sanchar Nigam Ltd., and Anr.-petitioner Vs. Union of India & Ors.-Respondent) decided on 2.3.2006 which we respectfully follow and hold that in the value of SIM Card activation charges could not be included.”

The assessee petitioner placing reliance on the provisions of Section 43 of the Act and Rules 35 and 38 of the Haryana General Sales Tax Rules, 1975 (for brevity, ‘the Rules’) made two applications dated 15.5.2006 (P-2 and P-3) with a request to the assessing authority that amount of Rs. 95,66,924/- in respect of both the assessment years, as already noticed in the preceding para, be refunded. On 17.5.2006, the assessing authority asked the assessee petitioner to appear on 12.6.2006 before it for recalculation of the tax liability for the assessment years 2000-01 and 2001-02 to determine the refund amount (P-4). Accordingly, the representative of the assessee petitioner appeared on 12.6.2006 but the hearing was deferred to 21.6.2006. The assessing authority, vide orders dated 21.6.2006 (P-5 & P-6) recalculated the tax for the assessment years 2000-01 and 2001-02 under the Act and found that the assessee petitioner was entitled to refund of Rs. 95,66,924 in respect of both

the assessment years. The assessing authority further observed in his orders Annexures P-5 and P-6 that applications for refund have already been filed by the assessee petitioner and refund may be allowed. The assessee petitioner did not receive the recalculated amount of refund as per the orders dated 21.6.2006 passed by the assessing authority and it had to send a reminder dated 15.2.2007 (P-7). Despite reminder and the clear position in law, no refund was made, which led to the filing of the instant petition on 2.5.2007.

In the written statement filed by the respondents it is claimed that the Assessing Authority, Sonapat, passed orders dated 21.6.2006 (P-5 & P-6) for refund of the amount in accordance with the observations made by the Tribunal in its order dated 25.4.2006 (P-1). It has been pleaded that thereafter respondent No. 2 following the provisions of Rule 36 of the Rules placed the matter relating to the refund of the assessee petitioner before the Deputy Excise and Taxation Commissioner, Sonapat, who made the following observation:-

“Financial Year: 2000-2001

“Action under section 10 of Central Sales Tax is pending as the dealer purchased goods against “C” forms and disposed of in free scheme. Assessing Authority to take action immediately.”

Financial Year: 2001-2002

“As per balance sheet the dealer purchased goods against “C” forms and disposed of in free scheme. Penal action

under section 10 of C.S.T is pending. Assessing Authority to examined and take action.”

It has, thus, been pleaded that refund could not be given to the assessee petitioner within the stipulated period as penal action under Section 10A of the 1956 Act were yet to be finalized. The respondent State has also pointed out that the revisional authority, vide his order dated 30.5.2007 (R-1), after affording due opportunity to the assessee petitioner has imposed a penalty amounting to Rs. 16.00 lacs under Section 10A of the 1956 Act and without loss of time, the assessing authority worked out the refund vide his order dated 7.6.2007, by deducting penal amount of Rs. 16.00 lacs and released the payment of Rs. 30,58,324/- (R-1). The amount has been finally paid to the assessee petitioner on 29.6.2007. Referring to Rule 36 of the Rules, it has been asserted that all refunds where the amount to be refunded exceeds ten lacs rupees, have to be approved by the Excise and Taxation Commissioner, Haryana, Chandigarh and refund can only be released after such order. It has been further asserted that the Assessing Authority, Sonapat, vide his order dated 2.11.2006, dropped the penal proceedings under Section 10A of the 1956 Act for the financial year 2001-02 and vide his order dated 10.11.2006, found the assessee petitioner entitled to refund. The recommendation was placed before the Excise and Taxation Commissioner, Haryana through proper channel, which consumed some time and order was passed on 16.4.2007 for refund of an amount of Rs. 49,08,600/- and accordingly refund voucher for the aforementioned amount was given to the assessee petitioner on 30.5.2007. It is claimed that the assessee

petitioner is not entitled to any interest under Section 43 of the Act read with Rule 35 of the Rules.

The factual position with regard to the amount of refund and its receipt as pleaded in the written statement has not been disputed by Mr. Avneesh Jhingan, learned counsel for the assessee petitioner. However, he has argued that interest as per Section 43(2) of the Act read with Rule 36 of the Rules is required to be paid at the rate of 12% in respect of the first month and at the rate of 18% in respect of the later period. In support of his submission, apart from placing reliance on the statutory provisions, learned counsel has relied upon a Division Bench judgment of this Court in the case of **Punjab State University Text Book Board v. State of Punjab**, (1990) 79 STC 216, which has also been followed by this Court in the case of **Haryana Drinks Private Limited v. State of Haryana**, (1993) 88 STC 332. He has also relied upon judgment of Calcutta High Court in the case of **State of West Bengal v. Satyesh Ch. Lahiry**, (1979) 44 STC 246 and Allahabad High Court in the case of **Modi Industries Limited v. Commissioner of Sales Tax, U.P.**, (1983) 54 STC 96 and argued that refund cannot be refused on the ground that rectification application was pending or review was filed against the order of refund. For the later proposition, learned counsel has placed reliance on another Division Bench judgment of this Court in the case of **M/s Muni Roller Flour Mills Pvt. Ltd. v. State of Haryana**, (2006) 28 PHT 292 (P&H) and argued that there was no proceedings pending in the present case warranting withholding of

refund. Therefore, it has been submitted that in no case a refund could have been withheld and the assessee petitioner is entitled to payment of interest. Mr. Jhingan has also submitted that the refunded amount in respect of assessment year 2000-01 is Rs. 30,58,324/- as against Rs. 46,58,324/- and the amount of Rs. 16.00 lacs deducted as penalty under Section 10A of the 1956 Act shall be contested at an appropriate forum.

Ms. Ritu Bahri, learned State counsel has vehemently argued that no interest is payable to the assessee petitioner in view of the provisions of Rule 36 of the Rules, which imposes a statutory obligation on the assessing authority to seek approval of the Excise and Taxation Commissioner through proper channel, if the refund amount exceeds Rs. 10 lacs. She has further argued that the Excise and Taxation Commissioner passed an order on 16.4.2007 and based on that order the assessing authority passed the consequential order on 28.6.2007. The payment of refund amount was released to the petitioner on 29.6.2007. According to the learned State counsel there is no delay in making the payment and no interest, therefore, is payable to the assessee petitioner.

We have minutely considered the submissions made by the learned counsel for the parties and are of the view that the prayer made by the assessee petitioner deserves acceptance. It would be necessary to notice provisions of Sections 25(5) and 43 of the Act as well as Rules 35, 36 and 38 of the Rules, which are reproduced as under:-

“SECTION-25

SUBMISSION OF RETURNS AND PAYMENT OF TAX

(1) to (4) xxx xxx xxx xxx

(5) If any dealer fails to pay tax, as required by sub-section (2A) or by sub-section (3), he shall be liable to pay in addition to the tax payable, simple interest on the amount of tax remaining unpaid at one per cent per month from the date commencing with the date following the last date for the payment of tax, for a period of one month and at one and a half per cent per month thereafter during the period he continues to make default in the payment: (emphasis added)

Provided that where the amount of tax not paid as required under sub-section (2A) or sub-section (3) does not exceed five hundred rupees, the interest payable thereon shall not exceed the amount of tax not so paid:

Provided further that for the purposes of calculation of interest, a period of fifteen days or more shall be deemed to be one month and the amount of fifty rupees or more but less than one hundred rupees shall be deemed to be one hundred rupees and a period of less than fifteen days and an amount of less than fifty rupees shall be ignored.”

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REFUND

(1) The assessing authority or a person appointed to assist the Commissioner under sub-section (1) of section 3, as the case may be shall, in the prescribed manner, refund to a dealer or to any other person the amount of tax or penalty or interest paid by him in excess of the amount due from him under this Act, either by a refund voucher, or at the option of the dealer by adjustment of the amount so paid against the amount due from him in respect of any other period;

Provided that the assessing authority or a person appointed to assist the Commissioner under sub-section (1) of section 3, as the case may be shall first adjust the amount to be refunded towards the recovery of any amount due, on the date of adjustment from the dealer and shall then refund the balance, if any.

(2) Where an amount required to be refunded by the assessing authority to any person by virtue of an order issued under this Act is not so refunded to him within the period as may be prescribed, the dealer shall be entitled to interest at such rates and on such terms and conditions as may be prescribed.”

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“RULE-35

REFUND [Section 43]

(1)(a) While framing the assessment of a dealer, the assessing authority shall, after such scrutiny of its record and after making such enquiries as it considers necessary, determine the amount paid by him, in excess, if any, and thereafter direct the refund of such amount as may remain after deducting any amount due from him. The assessing authority shall then issue to the dealer at his option a refund payment in form S.T.R. 34 prescribed under the Punjab Subsidiary Treasury Rules or refund adjustment order in form S.T. 34 and send it alongwith the assessment order.

(b) Where a refund of any amount paid by any dealer or other person becomes payable as a result of the order of any appellate or revisional authority or any court and the same is not the subject-matter of any further proceedings, the dealer or such other person shall make an application to the assessing authority concerned alongwith the original order or the copy thereof duly attested by the dealer, which constitutes the basis for refund, the assessing authority shall order the refund of excess amount in the manner specified in clause (a) within ninety days of the receipt of such application, failing which interest shall be payable to the dealer or other person at the rate specified in sub-section (5) of Section 25 of the Act, unless the Commissioner for reasons to be recorded in writing condones the delay.

(c) Where refund of any amount becomes payable under rule 24-A, the assessing authority shall examine claim and order the refund as admissible within thirty days of the receipt of the application of the dealer alongwith the relevant return. This refund shall be provisional and shall be subject to the assessment to be made under the Act. The provisions of sub-rule (1) shall apply mutatis-mutandis, in relation to determination and manner of payment of refund and interest thereon, if any.

(2) Where the refund of tax is claimed in respect of any declared goods sale or purchase of which has been subjected to tax, under the Act prior to the sale of such goods in the course of inter-State trade or commerce and in respect of which tax under the Central Sales Tax Act, 1956, has been paid, the dealer who effected the inter-State sale of such goods shall make an application for refund in form ST 32 and append thereto the following documents, namely:-

- (i) certificate(s) in form ST.14 in respect of each transaction from the registered dealer who paid tax under the Act on an earlier transaction of sale or purchase of the goods.
- (ii) a copy of the return in form ST 9 or ST 10 or both, as the case may be, for the period during which the exemption under section 27 was claimed by him.

- (iii) a copy of the Central Sales Tax return in Form 1 for the said period.
- (iv) such other documents or evidence as the assessing authority may require for his satisfaction that the tax leviable on such goods under the Act has been paid and the goods in respect of which the refund is claimed were subsequently sold in the course of inter-State trade or commerce, and charged to tax and the tax levied under the Central Sales Tax Act, 1956, has been paid.

(3) Where the dealer is unable to identify the goods purchased with the goods resold, it shall be presumed that the goods purchased have been resold, in the chronological order in which they were acquired.”
(emphasis added)

“RULE-36

DETERMINATION OF AMOUNT OF REFUND

[Section 43]

When the assessing authority is satisfied after such scrutiny of accounts and such enquiries as it considers necessary that the claim for refund is admissible, he shall, subject to proviso to section 43 determine the amount of refund due if not already determined under sections 39, 40, 41 and 42 and record an order sanctioning the refund, if the amount to be refunded

exceeds ten thousand rupees but does not exceed five lac rupees, he shall submit the record of the case together with his recommendation to the Officer Incharge of the district. If the amount of refund exceeds five lac rupees but does not exceed ten lacs rupees, the district in-charge shall refer the case to Joint Excise and Taxation Commissioner of the division for his approval. In case the amount of refund exceeds ten lacs rupees, the case shall be referred by the district Incharge along with his recommendations to the Commissioner for his prior permission. The decision in all such cases shall be taken within a period of ninety days.”

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“RULE-38

**ORDER SANCTIONING INTEREST ON
DELAYED REFUNDS [Section 43]**

(1) Where a refund payment order or a refund adjustment order is issued the authority issuing such order shall simultaneously record an order sanctioning the interest payable if any on such refunds, specifying therein, the amount of refund, the payment of which was delayed, the period of delay for which such interest is payable and the amount of interest payable by the State Government, and shall communicate the same to the dealer to whom the interest is payable and also to the

Commissioner stating briefly the reasons for the delay in allowing the refund.

(2) Where an order for the payment of interest on delayed refunds under sub-rule (1) has been made, the sanctioning authority shall issue to the dealer interest payment order in form S.T. 35”

A perusal of Section 43 of the Act makes it obvious that the assessing authority or any other person is under an obligation to pay refund to a dealer or to any other person, the amount of tax or penalty or interest paid by him in excess of the amount due from him, by a refund voucher or at the option of the dealer make adjustment of the amount so paid. A further perusal of sub-section (2) of Section 43 of the Act would manifest that the dealer has been held entitled to interest at such rate and on such terms and conditions as may be prescribed. Rule 35(1)(b) of the Rules clearly provides that in case the refund has become due on account of an appellate order then the amount so determined has to be refunded within 90 days from the date of filing the application. For the rate of interest provision has also been made in Rule 35(1)(b) that a dealer is entitled to interest at the rate specified in sub-section (5) of Section 25 of the Act unless the Commissioner, for reasons to be recorded in writing, condones the delay. A reference to sub-section (5) of Section 25 of the Act reveals that the legislation has provided for mutuality and the same rate of interest payable by a dealer for delayed payment of tax, interest or penalty has also been provided for the benefit of the dealer in case

there is a delay by the revenue in making payment of the refund. Accordingly, it has been provided that for the first month of delay, the rate of interest would be 12 per cent per annum (one per cent per month) and thereafter 18 per cent per annum (one and a half per cent per month) till the actual payment.

In the present case, once the Tribunal has directed payment of refund, vide order dated 25.4.2006, the only requirement on the part of the assessee petitioner was to move an appropriate application before the assessing authority for the refund of the amount. Two applications were filed by the assessee petitioner on 15.5.2006 (P-2 & P-3). The period of 90 days as provided by Rule 35 (1)(b) of the Rules came to an end on 15.8.2006. However, it is conceded position that the payment has been made in respect of the assessment year 2000-01, amounting to Rs. 30,58,324/- on 29.6.2007 and in respect of the assessment year 2001-02, amounting to Rs. 49,08,600/- on 30.5.2007. Therefore, there is apparent delay in making the payment of refund and the assessee petitioner is entitled to interest at the rate of 12 per cent per annum for the first month of delay and at the rate of 18 per cent per annum for the following months. For the aforementioned view we are fortified by the judgments of this Court in the case of M/s Muni Roller Flour Mills Pvt. Ltd. (supra) and **Khem Ram Devi Sahai v. State of Haryana, (2004) 23 PHT 330.**

The argument raised by Ms. Ritu Bahri, learned State Counsel based on Rule 36 of the Rules does not cut any ice because in the present case the amount of refund stood determined on

21.6.2006 by the assessing authority as is evident from the perusal of Annexures P-5 and P-6. The approval accorded by the Excise and Taxation Commissioner vide his order dated 16.4.2007 and the consequential order passed by the assessing authority on 28.6.2007 would not constitute the basis for consuming as much time as those authorities may like. The principle concerning refund are based on mutuality as is evident from the conjoint reading of Rule 35(1)(b) of the Rules with sub-Section (5) of Section 25 of the Act. According to the aforementioned provisions a dealer is also entitled to interest at the same rate as would be realized by the Revenue in case of delay in making payment of tax, interest or penalty to the Revenue. Therefore, we find no merit in the contention raised and the same is hereby rejected.

In view of the above, the writ petition is allowed. The Excise and Taxation Officer-cum-Assessing Authority, Sonapat-respondent No. 2 is directed to pay interest to the assessee petitioner for the delayed payment of refund. The interest shall be calculated at the rate of 12 per cent per annum in respect of delay for the first month of delay and at the rate of 18 per cent per annum in respect of delay caused for the subsequent months. The needful shall be done within a period of one month from the date of receipt of certified copy of this order.

(M.M. KUMAR)
JUDGE

July 20, 2007
Pkapoor

(AJAY KUMAR MITTAL)
JUDGE

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